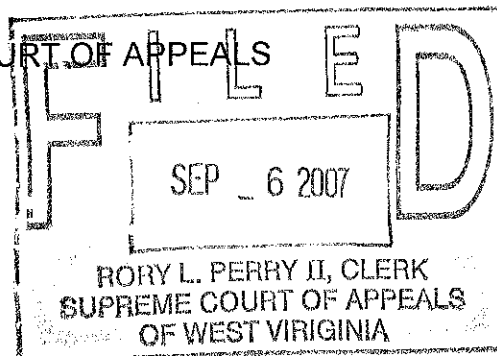


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, EX. REL.
NATIONWIDE MUTUAL INSURANCE COMPANY

Petitioner/Defendant Below,



v.

Docket No.:

THE HONORABLE MARK A. KARL, JUDGE
OF THE CIRCUIT COURT OF MARSHALL
COUNTY AND STACEY MEADOWS

Civil Action No. 99-C-12K

Respondents

**NATIONWIDE MUTUAL INSURANCE COMPANY'S
VERIFIED PETITION FOR WRIT OF PROHIBITION**

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PETITION FOR WRIT OF PROHIBITION

Nationwide Mutual Insurance Company ("Nationwide") hereby petitions this Court pursuant to Article VIII, §3 of the Constitution of the State of West Virginia and West Virginia Code §§51-1-3 and 53-1-1, *et. seq.*, to issue a Writ of Prohibition against the Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, from identifying defense counsel's office as "Nationwide Trial Division" to the jury panel during voir dire. A copy of the Order Reflecting Rulings on Defendant's Objections to Plaintiff's Proposed Voir Dire is included as Exhibit 1 in Petitioner's Appendix of Exhibits. In the proceedings below, which commenced trial on April 23, 2007, Nationwide, as the underinsured motorist carrier, was defending in the name of the tortfeasor, Heather Loy.

The trial court grossly abused its discretion in overruling defendant's objection to plaintiff's proposed voir dire Question 12 which identified defense counsel's office as "Nationwide Trial Division." The trial court further abused its discretion when it refused to allow plaintiff's counsel to withdraw "Nationwide Trial Division" from its proposed voir dire Question 12 after defense counsel indicated it would seek a writ of prohibition.

This Court has original jurisdiction to issue a rule to show cause and a writ of prohibition pursuant to W.Va. Code §53-1-2 (2005) and West Virginia Rule of Appellate Procedure 14.

The trial court abused its discretion in denying defendant's original objection to the inclusion of "Nationwide Trial Division" during voir dire and continued its abuse of discretion when it refused to allow plaintiff's counsel to withdraw the inclusion of the objectionable language as the Court indicated that it intended to identify defense counsel's office as "Nationwide Trial Division" in all cases until instructed told not to do

so by the West Virginia Supreme Court of Appeals. The attached memorandum of law includes the statement of the case, the governing law and principles and an analysis of their application to this case, and further highlights the error committed by the lower court.

WHEREFORE, Nationwide prays that this Court:

1. Issue a rule to show cause why the writ should not be granted within an expedited time established by the Court;
2. Issue a writ of prohibition enjoining the Circuit Court of Marshall County from identifying defense counsel's office as "Nationwide Trial Division" to the jury panel during voir dire; and
3. Grant such other and further relief as the Court deems appropriate and necessary under the circumstances.

Respectfully submitted,

NATIONWIDE MUTUAL INSURANCE COMPANY

By Counsel



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VERIFICATION

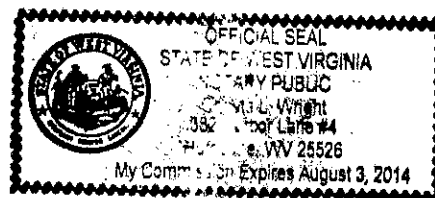
STATE OF WEST VIRGINIA)
)
COUNTY OF KANAWHA) SS.

In accordance with the requirements of W.Va. Code § 53-1-3 (2005), the undersigned being first duly sworn, states that he/she has read the foregoing Petition for Writ of Prohibition and that the factual representations contained therein are true except insofar as they are stated to be upon information and belief, and to the extent they are stated to be upon information and belief, he believes them to be true.

W. J. Flesher
W. STEPHEN FLESHER

SWORN TO and subscribed before
me this 04th day of June 2007

Christa L. Wright
Notary Public



MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION

I. STATEMENT OF THE CASE

Plaintiff's Complaint arose out of a February 28, 1999 three vehicle rear end automobile accident which occurred on West Virginia State Route 2 near John Marshall High School. All persons involved in the auto accident were students at John Marshall High School at the time. Plaintiff Meadows, then age 17 years old, was an unrestrained rear seat passenger in the second vehicle in the three vehicle accident.

Plaintiff was seen briefly in the Emergency Room at Reynolds Memorial Hospital following the accident. Her X-rays were negative and she was released with instructions to follow up with her family physician and with directions to take Advil, as needed. Thereafter, she had two visits with her family physician and some additional X-rays which were also negative. Some eight months after the motor vehicle accident, plaintiff began treating with Dr. Thomas J. Romano and was diagnosed with myofascial pain syndrome and nocturnal myoclonus (nighttime jerking). Based on an allegedly abnormal SPECT scan and claimed problems with memory and concentration, plaintiff was also diagnosed with a traumatic brain injury. Plaintiff has also had approximately 100 visits with a massage therapist. Plaintiff's total claimed medical specials are \$ 20,009.96.

The driver of the rear vehicle, Heather Loy Suhodolski, was covered by an automobile liability policy issued by Motorist's Mutual with a policy limit of \$50,000/\$100,000. Motorist's Mutual eventually paid their policy limit. Nationwide then assumed the active defense of the case and continued to defend in the name of the

tortfeasor, Heather Loy Suhodolski. The underinsured policy in play is that of the driver of the vehicle in which plaintiff was riding. The applicable policy limit is \$50,000/\$100,000.

After multiple continuances, trial in the case commenced on April 23, 2007. Late in the afternoon of Friday, April 20, 2007, counsel for plaintiff hand-delivered thirteen additional and/or revised pretrial filings, including "Plaintiff's Revised Proposed Voir Dire" (attached hereto as Exhibit 2 in the Exhibit Addendum). Plaintiff's proposed voir dire Question 12 read as follows:

12. Do any of you know Amy Pigg Shafer, W. Stephen Flesher, Teresa D. Daniel, Brian E. Bigelow, Desiree H. Divita, Andrew F. Workman, Asad U. Khan, Michelle Winiesdorffer-Schirripa, Myra B. Lambert, Sarah E. Saul, Amanda Henderson, Wanda S. Buehner or any other member of the Law Offices of W. Stephen Flesher, **Nationwide Trial Division**, who have offices in Wheeling, Beckley, and Charleston, West Virginia, including attorneys, paralegals, secretaries, and other office staff, or their spouses, children, parents, brothers or sisters?

(emphasis added). Among other issues, counsel for defendant objected to the inclusion of "Nationwide Trial Division" being included in Question 12 as phrased. Defendant's objection to Question 12 as to identifying the paralegals at the offices of defense counsel was overruled. However, the Court ruled it would designate that Myra B. Lambert, Sarah E. Saul, Amanda G. Henderson, and Wanda S. Buehner are "paralegals" as opposed to "attorneys." Defendant's objection to Question 12 to the

extent it included reference to "Nationwide Trial Division" was overruled. The discussion had in chambers between counsel and the Court was as follows:

THE COURT: Okay. Any other objections, Ms. Shafer?

MS. SHAFER: Yes, Your Honor. On Question 12, 13 as well – well, I know 12, it's asking if you know any of the attorneys in my firm. It also lists the paralegals in the firm. It doesn't specifically designate them as paralegals. Starting at Myra B. Lambert, Sarah Saul, Amanda G. Henderson and Wanda S. Buehner; those are paralegals, not attorneys.

I also object to Nationwide Trial Division being identified during voir dire. Let's see if that's also mentioned in 13. Thirteen also refers to the paralegals again, but I don't think it mentions Nationwide Trial Division, but I do object to Nationwide Trial Division being identified.

THE COURT: But is that not the name of the firm?

MS. SHAFER: The name of the firm is The Law Offices of W. Stephen Flesher. The only reason Nationwide Trial Division has ever been on there is because that's what the ethics opinion says has to be on there, but if I recall the ethics opinion correctly, it speaks to how on things like pleadings and so forth, the – so that the jurors wouldn't, you know, know about captive firms.

MR. BORDAS: Your Honor, with regard to that, you know, it's on their letterhead. When they call up potential witnesses that may be witnesses in their case – if they're independent witnesses, or whatever, that's how they – even when I've called their offices, they've referred to themselves as Nationwide Trial Division.

I think that when they're commonly known in the area as Nationwide Trial Division, that's the only way to ferret out whether or not any of these people have had contact with them.

The offices of Stephen Flesher is really not what they're known as. That changes. It's been Duane Tinsley; it's been – who is the one fellow who was just here recently before him?

MS. SHAFER: Dana Eddy.

MR. BORDAS: Dana Eddy it's been referred to. It's now Flesher. It changes every year depending on who's there.

Everybody knows it as Nationwide Trial Division. We have to find out if they know any of these people.

With regard to the paralegal, in the last trial that we had in Marshall County where their firm was involved, one of the jurors knew the paralegal and that's actually the subject of a motion for new trial now.

Apparently the paralegal and the juror knew each other and that wasn't disclosed. So that's why we wanted to take this precaution and ask about the paralegals, because they're on their letterhead as well.

THE COURT: I'm going to ask the question as it's framed. Objection and exception is noted on behalf of the defendant. Any other objections?

MS. SHAFER: With respect to the Nationwide Trial Division, I am going to need to probably consult with my client at some point before we start.

THE COURT: I'm sorry? When you say your client, are you talking about Ms. Suhodolski, or are you talking about –

MS. SHAFER: No. I am going to have to talk with somebody from Nationwide.

(Transcript, pgs. 5-7)(Transcript of April 23, 2007 proceedings before the Circuit Court of Marshall County, West Virginia, Judge Mark A. Karl, presiding, attached hereto as Exhibit 3). See "Order Reflecting Rulings on Defendant's Objections to Plaintiff's Proposed Voir Dire" (attached hereto as Exhibit 1 in the Exhibit Addendum).

As indicated above, while still in chambers and after the trial court's refusal to strike the "Nationwide Trial Division" language from plaintiff's proposed voir dire Question 12, counsel for defendant indicated that she needed to speak with her client regarding the court's ruling. Following a brief recess, counsel for defendant returned to chambers and indicated she and her client wished to seek a writ of prohibition with

respect to the trial court's ruling on the inclusion of the "Nationwide Trial Division" language in Question 12 (Transcript, pg. 24-25).

In an effort to avoid further delay and have the trial go forward, counsel for plaintiff withdrew the phrase "Nationwide Trial Division" from proposed voir dire Question 12 (Transcript, pg. 31). However, in a further abuse of discretion, the trial court judge indicated the Court would not allow plaintiff's counsel to withdraw the "Nationwide Trial Division" reference (Transcript, pg. 31). Specifically, the discussion in chambers was as follows:

MR BORDAS: Your Honor, can we withdraw the question in light of that?

THE COURT: No, and I'll tell you why. I had a chance to reflect on this. I have a number of cases involving Nationwide Trial Division where this same issue is going to come up, so I want it resolved.

I've reflected. I went back through a file that I have in which Ms. Schirripa is involved in. It's the same thing. So I want it resolved because I intend to advise the jury, and I want to know if any of those jurors out there are insured by Nationwide.

This issue is going to come up – if not today, it's going to come up time and time again. I want it resolved. If I don't have it today, it's going to come up a month from now or two months from now. So I want it resolved. If the Supreme Court's going to take a look at it, fine, so be it. If not, we'll proceed and I intend to ask that question.

(Transcript, pg. 31). Accordingly, the case of Sullivan v. Ostrander, Civil Action No.: 04-C-33 which was set to commence trial on May 14, 2007 in Marshall County, West Virginia before Judge Mark A. Karl was continued pending this Court's ruling on the instant Petition for Writ of Prohibition.

II. ISSUE PRESENTED

Whether the trial court exceeded its legitimate powers and abused its discretion when it denied defendant's objection to plaintiff's late filed revised proposed voir dire Question 12 which identified defense counsel's office not only as the Law Offices of W. Stephen Flesher, but also as "Nationwide Trial Division" and whether the trial court further abused its discretion when it indicated it would identify defense counsel's office to the jury panel as "Nationwide Trial Division" even after plaintiff's counsel indicated he would withdraw the "Nationwide Trial Division" language from Question 12 in an effort to have his client's trial proceed.

III. LAW AND ARGUMENT

A. Legal Standard for Issuing a Writ of Prohibition

Pursuant to W.Va. Code § 51-1-3, this Court has original jurisdiction in cases of prohibition. "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code §53-1-1. Nationwide respectfully submits that the trial court exceeded its legitimate powers when it overruled defense counsel's objection to the inclusion of the "Nationwide Trial Division" in reference to how defense counsel's office was to be identified and when it further refused to allow plaintiff's counsel to withdraw "Nationwide Trial Division" from plaintiff's proposed voir dire Question 12.

This Court has established the following guidelines to determine whether a writ of prohibition should issue:

- (i) Whether the Petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief;
- (ii) Whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (iii) Whether the lower court's order is clearly erroneous as a matter of law;
- (iv) Whether the lower court's order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and
- (v) Whether the lower court's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, *State ex. rel. Hoover v. Burger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). In reviewing for an abuse of discretion, this Court will not "rubber stamp" the trial court's decision. *Leung v. Sanders*, 213 W.Va. 569, 575, 584 S.E.2d 203, 209 (2003). These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Of course, where a statute specifically addresses the particular issue at hand, it is that authority, not these general guidelines, that is controlling. *Hoover v. Burger, supra*, 483 S.E.2d at 21.

B. The Trial Court's Ruling is Clearly Erroneous as Matter of Law

The West Virginia Office of Disciplinary Counsel addressed the *Ethical Propriety of Insurance Company Captive Law Firms* in L.E.I. 99-01. After clearing the ethical propriety of captive firms, the second question considered by the subcommittee was whether captive law firms had to disclose their affiliation with the insurance company on

letterhead and the like. The Board advised captive firms, consistent with its prior opinion on Trade Names for Advertising Purposes, to disclose the affiliation with the insurance company on letterhead, business cards, phone book listings, phone answering method, office entrances, and pleadings. Plaintiff's counsel argued that defense counsel's office had "Nationwide Trial Division" on their letterhead and pleadings and answered the phone such to identify "Nationwide Trial Division." The trial judge agreed that he had heard defense counsel's receptionist answer the phone with "Nationwide Trial Division" (Transcript, pgs. 5-7 & 26-27).

Nationwide Trial Division conducts business not as it might otherwise choose, but such that it is in compliance with the recommendations and findings of the Lawyer Disciplinary Board. The Board specifically noted an exception with respect to a pleading or other communication that might be submitted to a jury. *See, supra, L.E.I. 99-01*, page 12-3. The Board was clearly cognizant of the fact that just because a captive firm was serving as defense counsel, the insertion of "insurance" into the case at a jury trial should be strongly guarded against. *Id.* It follows then that if pleadings and correspondence that might be seen by a jury should be redacted so as to not identify the insurance company involved that verbally identifying the insurance company during voir dire was not contemplated by the Disciplinary Board.

Moreover, the fact that Nationwide Trial Division may have law offices and lawyers in multiple jurisdictions and locations across the country is no different with respect to what questions need to be asked of a potential juror during the voir dire process than if a large national or regional private law firm doing business across the country with hundreds or thousands of affiliated lawyers had been involved on behalf of

the defendant. For example, if the Jackson Kelly, Jones, Day, or Skadden, Arps firms had been involved, defendant doubts that counsel for plaintiff or the trial judge would have insisted on a listing of all lawyers in the United States and abroad be read to the jury, or even that a listing of all of the firm's locations be read to the jury to ensure that no juror might actually have had some prior relationship with the particular attorney's office.

Moreover, the fact that defense counsel is paid by Nationwide is no different than if Nationwide were paying a lawyer at an outside private law firm to defend its insured, or if Allstate or State Farm had been paying a lawyer to defend one of its insureds. Incredulously, are we to assume that the next development in our trial courts is going to be that the name of any insurance company paying for a defense of one of its insureds is subject to be identified during voir dire in all jury trials? Clearly, this result would be to the detriment of all defendants being represented by insurance defense counsel.

Admittedly, the instant case involves an underinsured carrier defending "in the shoes" of the tortfeasor. However, Nationwide's right under West Virginia Code § 33-6-31(d) to defend in the name of the tortfeasor rather than in its own name would be usurped if its identity was made known to the jury when defense counsel's office was identified as "Nationwide Trial Division." As this Court well knows W. Va. Code § 33-6-31 (d) allows an uninsured or underinsured motorist carrier "the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name." West Virginia Code § 33-6-31(d) clearly contemplates protecting the insurer from unfair prejudice at trial by specifically allowing the insurance company to defend the case in the name of

the tortfeasor rather than in its own name as defending in the name of the insurance company discloses that insurance money is available to pay any verdict rendered. Admittedly, there are instances like drunk driving accidents where the insurance company might wish to distance itself from the tortfeasor and will defend in the insurer's name. However, the case before this Court was not such an instance. West Virginia law allows the underinsured motorist carrier to elect whether to defend in the name of the tortfeasor or in its own name. *State ex. rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993). There was nothing about the instant case which would have caused an insurance company to want to distance itself Heather Loy Suhodolski.

Nationwide was authorized by statute to stand in Ms. Suhodolski's shoes to defend the underinsured claim. Thus, the trial judge's order overruling the objection to the inclusion of "Nationwide Trial Division" in Question 12 was in violation of the findings and parameters set by the Office of Disciplinary Counsel allowing captive law firms and in violation of 33-6-31(d) which allows the underinsured carrier to defend in the name of the tortfeasor.

Appellant submits that asking the jury pool if they had ever been represented by "Nationwide Trial Division" clearly violates Nationwide's ability to defend in the name of the tortfeasor and to have this case tried before an impartial and unbiased jury. Voir dire Question 14 which was also ruled permissible by the trial court asked: "Are you or any of your family members employed by Nationwide Insurance Company or any of its affiliates." The only motivation for seeking to ask the jury panel if they had been represented by the "Nationwide Trial Division," or had worked for Nationwide was to inappropriately inject the issue of the insurance coverage into the case. The trial

court's rulings allowing Questions 12 and 14 would have served to let the jury panel know from the very first moments of the trial that there was insurance money available to apply to any verdict rendered.

The fact that the attorney retained to defend the underinsured claim was employed by Nationwide Trial Division is irrelevant in the courtroom. With all due respect to plaintiff's counsel and the trial court, there are other ways to determine if a potential juror had been represented by one of Ms. Shafer's current or former colleagues without identifying the insurance company defending against the plaintiff's claims.

C. The Trial Court's Order is an Often Repeated Error or Manifests Persistent Disregard for Substantive Law Giving the Petitioner No Other Adequate Means to Obtain Relief

The trial judge clearly indicated in his comments in chambers on the morning of trial that he intended to ask the jury pool if they had been represented by Nationwide Trial Division not only in this case but in all cases with Nationwide Trial Division until the Supreme Court told him not to do so (Transcript, pg. 31, lines 3-18). As previously indicated, this has already resulted in the continuance of one trial with Judge Karl. Judge Karl has indicated he wants the issue resolved. This Court should resolve the issue by granting the writ of prohibition against the trial court judge as the trial judge's ruling on the voir dire issue flies in the face of L.E.I. 99-01 and of 33-6-31(d).

Moreover, Judge Karl is not the only trial court judge to have allowed the identification of defense counsel's office as "Nationwide Trial Division." In the case of Clint Ryan Chiplinski v. Christine Sampson, Ohio County Civil Action No. 04-C-26,

Judge James P. Mazzone, Appeal No. 070407, over defendant's vehement objections, specifically asked the jury panel not only if they had been represented by counsel for defendant or anyone else at the Law Offices of W. Stephen Flesher, but asked the jurors if they had ever been represented by "Nationwide Trial Division." *Chiplinski Transcript at p. 38, lines 9-11* (Excerpts of Chiplinski transcript attached hereto as Exhibit 4).

Similar to the arguments made by Mr. Bordas in this case, counsel for plaintiff in the *Chiplinski* case argued that defendant's counsel worked directly for the insurance company and that her office elected to do business with Nationwide Trial Division on its letterhead. Counsel for plaintiff further argued that it therefore followed that the jury needed to be asked not just if they had ever been represented by the attorney for defendant or others with the Law Offices of W. Stephen Flesher having offices in Wheeling, Charleston, and Beckley, but whether they had ever been represented by the "Nationwide Trial Division." The discussion had in chambers with respect to the issue was as follows:

MR. FITZSIMMONS: And 6, it says as to the identity of Ms. Shafer's law firm on the stationery. We received the stationery, that's Nationwide, it's a division of Nationwide, and it actually says that they're employees at the bottom of the stationery. It identifies the attorneys as employees of Nationwide. There's been a turnover, so there's other attorneys, and by just saying "law firm," we need to identify what that law firm is. I know they use a trade name also with lawyers' names in it, but it's part of that.

MS. SHAFER: It's identified as ---

MR. FITZSIMMONS: I'm sorry. Mr. Shafer, let me finish. It also says "Nationwide" on the stationery and identifies it as Nationwide -- affiliated with Nationwide. So people that would be represented by the prior firms and predecessor firms, when they switch the names, whoever the head honcho is, I think they just use

his or her name – needs to be identified so that people know that. Not by a name of a lawyer, but by the name of the Nationwide because that's the successor firm really. They're an in-house employee law firm. The fact that they're Nationwide's attorney, we shouldn't change and go through some unreal analysis here to keep it from what it is. It's Nationwide's employee. It's Nationwide's law firm because they're employees and that needs to be identified. That's who they are and that's who they've chosen to be and that's their choice. We would ask that it be identified properly.

MS. SHAFER: Obviously, I take issue with that position. Captive counsel is permitted in West Virginia. We do business the way that we were told that that can be handled in West Virginia as the Law Offices of W. Stephen Flesher. There's not been any recent turnover other than a new managing attorney. No different than if Bob Steptoe stepped down and somebody new went in over there or at any other firm. The fact that the letterhead says "Nationwide Trial Division" is not – it has to, pursuant to the guidelines put forth for captive firms doing business in West Virginia.

But what we want these juror to – what we want to know from jurors – that they have been represented by me or somebody else in my firm, and we have an accurate listing of the firm members. And the only recent change has been Dana Eddy's departure and Steve Flesher's hire, and I – it would be perfectly acceptable to me to mention Dana Eddy's name as having been the most recent leader of the firm.

Obviously to do as Mr. Fitzsimmons suggests, obviously, injects insurance into the case.

MR. FITZSIMMONS: It is not injecting insurance. It is who they are. And if the guidelines require that identification on letter, so there's not misrepresentation as to who they are, they certainly would apply in this court that they're employees in Nationwide's trial division. That could go quite some distance if people lived in other states and had been represented by Nationwide Trial Division. We need to know that. That's who they are. They elected to be those – an employee, and the fact that it's on the letterhead and that, I think is even more evidence that you have to identify and represent properly who these people are.

I have a real thing about having fictitious names out there when they're employees of Nationwide, and we're trying to find out from the jury whether or not there's any relationship of any close alignments, and the only way to do that is to ask whether or not they've been represented by Nationwide Trial Division before. I think that's very important, Judge. They chose it. I didn't choose it. The fact that they have some fictitious name that they go by as

employees, that shouldn't change things. The true facts are that they're Nationwide's trial division, employees of Nationwide Insurance Company.

MS. SHAFER: My response would be that Nationwide did not chose anything. They are complying with the opinion from the Office of Disciplinary Counsel that provides how captive firm does business – can do business in West Virginia, and you have to have somebody's name in the title of the firm. It can't just be law offices. It can't just be Nationwide Trial Division. It can't be anything other than how it is done.

And the point about, you know, we have to know who these people are and if they've been represented by somebody else from Nationwide, well, how about a big firm like Jones, Day, or somebody like that, who had hundreds and hundreds and hundreds of attorneys across the country. When they try a case in Pittsburgh, I don't imagine they list every single member associates – or associates of that firm nationwide and internationally when they read who may be affiliated with Jones Day to a jury panel.

THE COURT: What I'll do is this: I'll ask a separate question that inquires as to whether or not any of the jurors have ever been represented by the Nationwide Trial Division, without saying that – Law Offices of W. Stephen Flesher are an employee of the Nationwide Mutual Insurance Company, Nationwide Trial Division, because, technically, I presume, that your client is the defendant, not Nationwide; correct?

MS. SHAFER: My client, as if I was employed in any other private defense firm, is Ms. Sampson, not Nationwide. The way I function is not different than if I was at Schrader Byrd doing insurance defense, Steptoe & Johnson doing insurance defense. If I was at Bowles Rice doing insurance defense.

THE COURT: Okay.

MS. SHAFER: And I, obviously, strenuously object to Nationwide Trial Division being mentioned in any respect during the trial, and I imagine that's going to become an overriding issue for the case for the trial.

THE COURT: Okay. All right. Well, it's Nationwide Trial Division that's been hired to represent the defendant; correct?

MS. SHAFER: No. It's been Amy Shafer at the Law Offices of W. Stephen Flesher.

MR. FITZSIMMONS: She's an employee of Nationwide. She gets a paycheck from Nationwide. And it is Nationwide Trial Division.

You don't have a private practice outside Nationwide, Ms. Shafer.

MS. SHAFER: If this case had been assigned to Tom Buck, as many Nationwide cases also are, he also is going to get paid by Nationwide.

THE COURT: Well, like I said, we'll ask a separate question as to whether or not any of the jurors had ever been represented by the Nationwide Trial Division, without associating that with Ms. Shafer or the Law Offices of W. Stephen Flesher, since there could be some confusion over doing it that with the jurors insofar as who their client is, either Nationwide or the defendant.

Where are you guys proposing that the question be inserted:

MR. FITZSIMMONS: Right after Ms. Shafer's law firm. It's No. 6.

THE COURT: Amy, what's the name of it, Nationwide Trial Division?

MR. FITZSIMMONS: Yes, that's what it's called, Judge.

MS. SHAFER: Law Offices of W. Stephen Flesher, with all due respect.

THE COURT: No, I understand that. But, I mean, the Law Offices of Stephen Flesher are employed by who, the Nationwide Trial Division? Is that what it's called?

MS. SHAFER: My office is Law Offices of W. Stephen Flesher. We have to, according to the disciplinary rule, put Nationwide on the letterhead so as to not misrepresent who we are. However, others have tried this before and have never been able to do it, and it is, obviously, inserting insurance into the case.

THE COURT: Okay. All right. No. 6 would then read: "Have any of you or any members of your immediate family ever been represented by the Nationwide Trial Division?", without any reference to Ms. Shafer or the Law Offices of Stephen Flesher vis-à-vis Nationwide or Nationwide Trial Division.

Okay. All right. Were there any other objections to --

Chiplinski transcript, pp. 7-14.

In both trials, the result of the "Nationwide Trial Division" inquiry served as nothing more than a means to let the jury know immediately that there was insurance coverage available to apply to any verdict rendered. In Chiplinski, it was also not an inadvertent, unsolicited mention of insurance by a witness, but an inquiry calculated to identify the defendant's carrier from the very beginning of the trial. The trial court judge in Chiplinski also directly identified the insurance company involved.

Two of the other standards for whether the issuance of the writ of prohibition is proper are whether the petitioner has no other adequate means for relief or the issue is not correctable on appeal. Given Judge Karl's representation that he intended to ask the voir dire question identifying not only the Law Offices of W. Stephen Flesher, but "Nationwide Trial Division" even after withdrawn by plaintiff's counsel and until told not to do so, petitioner has no other adequate means for relief short of appealing every verdict where the Circuit Court judge identifies "Nationwide Trial Division" during voir dire. This is further pointed up by the fact that Judge Karl continued the trial of the next case in line with the Wheeling Nationwide Trial Division office pending resolution of the "Nationwide Trial Division" voir dire issue now before this Court. Nationwide, as the petitioner, has no other adequate means for relief from the trial court's ruling on the voir dire issue except through this petition for writ of prohibition. Moreover, as a matter of judicial economy, this Court needs to grant the writ of prohibition in this case to stop what will likely produce a long line of petitions for appeal from Nationwide, State Farm, and the other insurers who utilize captive counsel in the State of West Virginia.

D. The Trial Court's Order Raises New and Important Problems or Issues of Law of First Impression

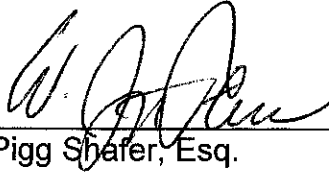
There is no West Virginia case law construing or referring to L.E.I. 99-01. This Court has never addressed the problems associated with having a jury panel told during voir dire that defense counsel was affiliated with a particular insurance company as captive counsel. The trial court's order overruling the objection to the inclusion of "Nationwide Trial Division" in the identification of defense counsel's office in Question 12 raises an issue of first impression in this state. Moreover, it raises an issue not just important to Nationwide Insurance Company, but also to State Farm which maintains a captive office in Charleston, West Virginia, and to various other insurance companies who have captive counsel practicing in West Virginia. Moreover, to allow the ruling of Judge Karl to stand sets in motion a slippery slope toward identifying the insurance company which retains private counsel to defend its insured.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner, Nationwide Mutual Insurance Company, respectfully requests that the Writ of Prohibition be issued.

Respectfully submitted,

NATIONWIDE MUTUAL INSURANCE COMPANY

A handwritten signature in dark ink, appearing to read 'Amy Pigg Shafer', is written over a horizontal line.

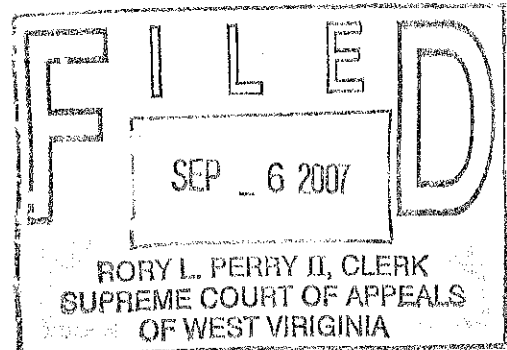
Amy Pigg Shafer, Esq.
W.Va. State Bar #7344
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Nationwide Trial Division
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(304) 233-6290

Counsel for Petitioner

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, EX. REL.
NATIONWIDE MUTUAL INSURANCE COMPANY

Petitioner/Defendant Below,



v.

Docket No.: _____

THE HONORABLE MARK A. KARL, JUDGE
OF THE CIRCUIT COURT OF MARSHALL
COUNTY AND STACEY MEADOWS

Civil Action No. 99-C-12K

Respondents

**MEMORANDUM OF PERSONS WHOM
THE RULE TO SHOW CAUSE SHOULD BE SERVED**

NOW COMES Petitioner, Nationwide Mutual Insurance Company, in support of its Petition for Writ of Prohibition submits this list of names and addresses upon whom the Rule to Show Cause should be served, if granted.

James G. Bordas, Jr., Esquire
Bordas and Bordas
1358 National Road
Wheeling, WV 26003
(Counsel for Plaintiff below)

The Honorable Mark A. Karl
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

CERTIFICATE OF SERVICE

Service of the foregoing **Petition for Writ of Prohibition**, including supporting Memorandum of Law, and **Attached Appendix of Exhibits** was had upon the plaintiff by facsimile and by mailing a true copy thereof by United States Mail, postage prepaid, to his attorney at his last known address, this 6th day of SEPT. 2007:

James G. Bordas, Jr., Esquire
Bordas and Bordas
1358 National Road
Wheeling, WV 26003
(Counsel for Plaintiff)

The Honorable Mark A. Karl
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041



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